

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VINCENT FREEMAN, II,

Case No.: 3:18-cv-00192-MMD-WGC

**Plaintiff**

## **Report & Recommendation of United States Magistrate Judge**

V.

Re: ECF No. 45

ARMANDO LOZANO-CARRERA,  
MILTON HSIEH,

## Defendants

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' Motion for Summary Judgment, arguing that Plaintiff failed to exhaust available administrative remedies. (ECF Nos. 45, 45-1 to 45-15.) Plaintiff, who is represented by counsel, filed a response. (ECF Nos. 46, 46-1.) Defendants filed a reply. (ECF No. 47.)

After a thorough review, it is recommended that Defendants' motion be denied.

## **I. BACKGROUND**

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), though the events giving rise to this action occurred while he was in the custody of the Clark County Detention Center (CCDC) (a division of Las Vegas Metropolitan Police Department (LVMPD)), with respect to various criminal charges as a pretrial detainee. He has filed this action for excessive force under the Fourteenth Amendment against Armando Lozano-Carrera

1 and Milton Hsieh pursuant to 42 U.S.C. § 1983. (Am. Compl., ECF No. 14.) Plaintiff alleges that  
 2 Defendants, without cause, attacked Plaintiff as he began to sit down in a courtroom holding cell.

3 Defendants move for summary judgment, arguing Plaintiff failed to exhaust his  
 4 administrative remedies prior to filing suit.

5 **II. LEGAL STANDARD**

6 The legal standard governing this motion is well settled: a party is entitled to summary  
 7 judgment when “the movant shows that there is no genuine issue as to any material fact and the  
 8 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp.  
 9 v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the  
 10 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.  
 11 Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome  
 12 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary  
 13 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the  
 14 other hand, where reasonable minds could differ on the material facts at issue, summary  
 15 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

16 “The purpose of summary judgment is to avoid unnecessary trials when there is no  
 17 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18  
 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose  
 19 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477  
 20 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that  
 21 one party must prevail as a matter of law”). In considering a motion for summary judgment, all  
 22 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re  
 23 Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*

1 & Moore Inc., 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the  
 2 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,  
 3 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and  
 4 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;  
 5 *Anderson*, 477 U.S. at 249.

6 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.  
 7 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must  
 8 come forward with evidence which would entitle it to a directed verdict if the evidence went  
 9 uncontested at trial.' ... In such a case, the moving party has the initial burden of establishing  
 10 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*  
 11 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations  
 12 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
 13 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
 14 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
 15 party cannot establish an element essential to that party's case on which that party will have the  
 16 burden of proof at trial. See *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

17 If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
 18 establish that a genuine dispute exists as to a material fact. See *Matsushita Elec. Indus. Co. v.*  
 19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine  
 20 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute  
 21 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."  
 22 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)  
 23 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment

1 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475  
 2 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the  
 3 pleadings and set forth specific facts by producing competent evidence that shows a genuine  
 4 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

5 **III. DISCUSSION**

6 **A. Exhaustion Requirement**

7 The Prison Litigation Reform Act (PLRA) provides that “[n]o action shall be brought  
 8 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a  
 9 prisoner confined in any jail, prison, or other correctional facility until such administrative  
 10 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

11 The failure to exhaust administrative remedies is “an affirmative defense the defendant  
 12 must plead and prove.” *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v.*  
 13 *Bock*, 549 U.S. 199, 204, 216 (2007)).

14 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely  
 15 or otherwise procedurally infirm grievance, but rather, the PLRA requires “proper exhaustion.”  
 16 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). “Proper exhaustion” refers to “using all steps the  
 17 agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).”  
 18 *Id.* (emphasis in original) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)).  
 19 Thus, “[s]ection 1997e(a) requires an inmate not only to pursue every available step of the prison  
 20 grievance process but also to adhere to the ‘critical procedural rules’ of that process.” *Reyes v.*  
 21 *Smith*, 810 F.3d 654, 657 (9th Cir. 2016) (quoting *Woodford*, 548 U.S. at 90). “[I]t is the prison’s  
 22 requirements, and not the PLRA, that define the boundaries of proper exhaustion.” *Jones v.*  
 23 *Bock*, 549 U.S. 199, 218 (2007).

1       Once a defendant shows that the plaintiff did not exhaust available administrative  
2 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is  
3 something in his particular case that made the existing and generally available administrative  
4 remedies effectively unavailable to him." *Albino*, 747 F.3d at 1172.

5       The exhaustion requirement also applies to pretrial detainees. *See Page v. Torrey*, 201  
6 F.3d 1136, 1140 (9th Cir. 2000).

7 **B. LVMPD/CCDC Grievance Process**

8       LVMPD Standard Operating Procedure (SOP) 14.00.00 governs inmate  
9 requests/grievances and complaints/grievances against staff. (ECF No. 45-14.) The SOP provides  
10 that informal resolution is encouraged, but "[i]f an inmate cannot obtain an informal solution and  
11 wishes to further address the request/grievance, the housing unit officer shall notify the floor  
12 sergeant" who will then attempt to informally resolve the request/grievance. (*Id.* at 2.) If an  
13 inmate cannot informally resolve the grievance, he "may wish to file a formal grievance for  
14 administrative remedy." (*Id.* at 3.)

15       SOP 14.00.00 then contains a list of items that are the "Officer's Responsibility,"  
16 including providing the inmate with the inmate request/grievance form and accepting the  
17 completed form from the inmate. (*Id.*) "The Officer will assist the inmate and ensure that his/her  
18 request is turned in and routed properly." (*Id.*) The Officer will also "[r]oute the form through  
19 proper channels of command to the designated address if unable to resolve [the]  
20 request/grievance." (*Id.*)

21       "All complaints of excessive force ... will be investigated/reviewed by the sergeant and  
22 responsible platoon lieutenant before the Inmate Request/Grievance Form is processed through  
23 the chain of command," referring to Section VI of the SOP. (*Id.*) Grievances "not resolved by the

1 officer or sergeant will be forwarded through the chain of command for resolution. The final step  
2 in resolution is the Deputy Chief, Detention Services Division (DSD)." (*Id.*)

3 Finally under the heading "Officer's Responsibility," it states that "[i]nmates may address  
4 grievances through the chain of command to get resolution of unresolved grievances. The inmate  
5 should provide documentation attached to the grievance showing he/she has attempted to resolve  
6 the grievance through the chain of command. *The officer will forward these grievances to the*  
7 *sergeant who will initial and forward through the chain of command until the grievance is*  
8 *resolved.*" (*Id.* at 4, emphasis added.)

9 Next, SOP 14.00.00, discusses the role of the sergeant, and says that "[e]ach supervisor,  
10 or acting supervisor, will annotate every Inmate Request/Grievance Form to indicate that it was  
11 reviewed and an attempt was made at resolving the Request/Grievance. This will be done by  
12 writing, at the bottom of the form, their initials and P# (legibly) *before forwarding up the chain*  
13 *of command.*" (*Id.*, emphasis added). A grievance concerning "use of force ... or staff  
14 misconduct will be investigated by the supervisor *and answered or forwarded up the chain of*  
15 *command as determined by the supervisor.*" (*Id.*, emphasis added.)

16 SOP 14.00.00 contains a separate heading for inmate complaints/grievances against staff,  
17 which is Section VI that was previously referred to. (*Id.* at 6-7.) That section states that an officer  
18 who receives a complaint from an inmate or employee misconduct will be immediately  
19 forwarded it to the appropriate floor sergeant. (*Id.* at 6.) The floor sergeant will review and  
20 investigate and attempt to resolve the complaint. (*Id.* at 7.) If the complaint is resolved, the  
21 inmate request/grievance form will be completed and signed by the floor sergeant and distributed  
22 normally. (*Id.*) If the complaint is not resolved by the floor sergeant, "the grievance will be  
23 forwarded to the appropriate platoon lieutenant." (*Id.*) If the complaint includes an accusation of

1 violation of department policy, procedure, rule, regulation or local, state or federal law, the floor  
2 sergeant will document it and handle it in accordance with LVMPD Department Manual  
3 5/101.26, "Maintenance of Values and Ethics." (*Id.*)

4       The complaint will then be reviewed by the appropriate platoon lieutenant who will  
5 attempt to resolve the complaint. (*Id.*) If resolved, the inmate request/grievance form will be  
6 completed and signed by the responsible platoon lieutenant and distributed normally. (*Id.*) If it is  
7 not resolved, or it is determined it is an allegation of violation of department policy, procedure,  
8 rule, regulation, state, local or federal law, the platoon lieutenant will complete a SOC, LVMPD  
9 Form 272, and handle in accordance with LVMPD Department Manual 5/101.26, "Maintenance  
10 of Values and Ethics." (*Id.*) The SOP goes on to indicate that after the platoon lieutenant, the  
11 bureau commander will review the complaint. Finally, under Section IV, the SOP provides that  
12 the investigation will be handled in accordance with LVMPD Department Manual 5/101.26,  
13 "Maintenance of Values and Ethics." (*Id.* at 8.)

14       SOP 14.00.00 also contains a section concerning Citizen Review Board complaint forms,  
15 and states that inmates requesting to make such a complaint will be provided the form; housing  
16 unit officers will assist the inmate with the form and it will be mailed to the Citizen Review  
17 Board. (*Id.* at 4-5.) According to its website, the LVMPD Citizen Review Board is an  
18 independent civilian oversight agency that reviews complaints of misconduct against LVMPD  
19 officers and reviews internal investigations by LVMPD. See <https://citizenreviewboard.com/>, last  
20 visited June 3, 2021.

21       Defendants also provide the declaration of LVMPD Sergeant Sheree Butler who states  
22 that inmates at CCDC with a complaint use the inmate grievance process. The first step is  
23 typically to speak with the inmate's housing unit officer, and if that does not provide a

1 satisfactory result, the inmate may file a formal grievance using an inmate request/grievance  
2 form (the forms were on paper at the time Plaintiff was at CCDC, but now are submitted  
3 electronically through a kiosk). Butler states that inmates may review the Inmate Handbook  
4 concerning the grievance process, which instructs inmates that they must address their  
5 grievances up the chain of command in the appeal procedure. She represents that the Inmate  
6 Handbook states that inmates must start with their unit housing officer, and if not satisfied,  
7 address each level of the chain of command, *i.e.*, officer, sergeant, lieutenant, captain and deputy  
8 chief. It further advises that appeal procedures are posted in each housing unit. Butler indicates  
9 that inmates have access to the Inmate Handbook. In addition, she states that it is common  
10 practice for corrections officers to inform inmates that if they are not satisfied with a  
11 response/decision they receive from an officer, they may appeal the decision up the chain of  
12 command. (Butler Decl., ECF No. 45-15.)

13       Butler also states that inmates may also make a complaint to the Citizen Review Board,  
14 but this is an advisory panel, and its decisions do not bind CCDC staff. Inmates need not  
15 complain to the CRB in the grievance appeal process. (*Id.*)

16 **C. Plaintiff's Grievance and CRB Complaint**

17       Plaintiff filed an inmate request/grievance on the issue of the use of force on  
18 August 5, 2016, addressed to the Field Services Lieutenant. Lieutenant Kathryn Bussell filled out  
19 the bottom portion of the grievance form on August 11, 2016, stating: "Issue has been resolved  
20 as follows: You and I discussed your grievance on 8-11-16. My office will be following up with  
21 the appropriate paperwork." (ECF No. 45-5 at 2.)

22       Plaintiff also filed a complaint about the incident with the Citizen Review Board on  
23 August 5, 2016. (ECF No. 45-6 at 3-4.) The Citizen Review Board screening panel dismissed the

1 complaint, agreeing with the investigation and conclusions reached of no violation, not sustained  
2 or unfounded. (*Id.* at 8.)

3 LVMPD Sergeant Steven Williams states in his declaration that he received Plaintiff's  
4 grievance on August 10, 2016, and began investigating by requesting video of the alleged  
5 incident and speaking with medical. He also instructed Lozano to complete a use of force report.  
6 He and Lieutenant Kathryn Bussell then reviewed the video and he reviewed the officers reports  
7 and concluded that Plaintiff's claims were false and the grievance was unfounded. According to  
8 Williams, "[t]he grievance and Use of Force investigation proceeded up LVMPD's chain of  
9 command, per policy." (ECF No. 45-9.)

10 In her declaration, Lieutenant Kathryn Bussell states that on August 11, 2016, a use of  
11 force investigation into Plaintiff's grievance was opened, and she reviewed the written reports,  
12 video and grievance, and spoke with Freeman and took pictures of his claimed injuries. She  
13 concluded that Plaintiff's complaints were unfounded and his grievance was contradicted by the  
14 evidence, and no policy violation occurred. (ECF No. 45-10.)

15 In his declaration, Plaintiff states that he does not recall being made aware of or being  
16 provided access to an Inmate Handbook for grievance appeal purposes, or being made aware of  
17 or having access to any rules for grievances appeals that Defendants claim were posted in the  
18 housing units. In addition, no officer ever told him he could appeal the decision on his grievance  
19 regarding officer misconduct. (Pl. Decl., ECF No. 46-1.)

20 Plaintiff also states that he was not made aware that he could seek monetary  
21 compensation for the violation of his rights through CCDC's grievance process. (*Id.*)  
22  
23

1     **D. Analysis**

2         Insofar as Plaintiff argues that he did not have to continue the grievance process because  
3 he was seeking damages and the grievance process did not offer damages as a remedy, the  
4 Supreme Court has rejected this argument. *Booth v. Churner*, 532 U.S. 731, 741 (2001) (holding  
5 that the inmate must exhaust administrative remedies irrespective of the forms of relief sought  
6 and offered through administrative avenues).

7         The question presented here is whether Plaintiff used all steps and followed all rules  
8 CCDC/LVMPD required to exhaust administrative remedies, or whether administrative remedies  
9 were otherwise unavailable to him.

10         It is clear that Plaintiff initiated a formal inmate grievance under SOP 14.00.00. The  
11 court's initial focus is on whether he was required to proceed all the way through the chain of  
12 command to complete the exhaustion process.

13         Under SOP 14.00.00, section II(B)(6), complaints of excessive force and staff  
14 misconduct, such as that alleged by Plaintiff, are investigated/reviewed by the sergeant and  
15 responsible platoon lieutenant before the inmate grievance form is processed through the chain  
16 of command (specifically referring to Section VI of this SOP). (ECF No. 45-14 at 3.) Section  
17 II(B)(7), which is the section discussing the *Officer's Responsibility* for formal inmate  
18 grievances, states that grievances not resolved by the officer or sergeant will be forwarded  
19 through the chain of command for resolution, with the final step being the Deputy Chief. (*Id.*) It  
20 then states again that inmates may address grievances through the chain of command to get  
21 resolution of *unresolved grievances*. (*Id.* at 4.) *The officer* is to forward these grievances to the  
22 "sergeant who will forward through the chain of command **until the grievance is resolved.**" (*Id.*)  
23

1 SOP 14.00.00, Section VI(B)(1)(b), similarly provides that an inmate  
2 complaint/grievance against staff will be forwarded to the appropriate floor sergeant, who will  
3 review and attempt to resolve the complaint. (ECF No. 45-14 at 6.)

4 Williams was the sergeant and he received and investigated Plaintiff's grievance and  
5 determined the grievance was unfounded. According to Williams, "[t]he grievance and Use of  
6 Force investigation proceeded up LVMPD's chain of command, per policy." He does not state  
7 that Plaintiff requested that it proceed up the chain of command, but that it proceeded up the  
8 chain of command per policy. Moreover, Williams did not sign the grievance form indicating the  
9 grievance was resolved at that time per SOP 14.00.00, Section VI(B)(2)(a)(2). (ECF No. 45-14 at  
10 7.) Instead, it was apparently forwarded to Lieutenant Bussell, consistent with SOP 14.00.00,  
11 Section VI(B)(2)(b). (*Id.*)

12 SOP 14.00.00, Section VI(B)(3)(a)(2), states that if the lieutenant resolves the complaint,  
13 the grievance form will be signed and distributed normally. (ECF No. 45-14 at 7.) Bussell filled  
14 in the grievance form indicating it had been "resolved" because the form states: "Issue has been  
15 resolved as follows: You and I discussed your grievance on 8-11-16. My office will be following  
16 up with the appropriate paperwork." (ECF No. 45-5 at 2.)

17 Again, SOP 14.00.00 says that the sergeant will forward the grievance through the chain  
18 of command **until it is resolved.** (ECF No. 45-14 at 4.) The grievance documentation reflects  
19 that the grievance was "resolved." Irrespective of whether it was Plaintiff's or a staff member's  
20 obligation to forward the grievance up the chain of command, that obligation ceased under the  
21 terms of SOP 14.00.00 when the grievance was deemed resolved by Lieutenant Bussell.  
22 Moreover, SOP 14.00.00 states in several places that it is the officer/sergeant who will forward  
23 the grievances through the chain of command. (ECF No. 45-14 at 3, SOP 14.00.00, Section

1 II(B)(6) (it is the Officer's Responsibility to "[r]oute the form through proper channels of  
2 command to the designated address if housing unit officer is unable to resolve  
3 request/grievance); Section II(B)(7) (under "Officer Responsibility," "Grievances that are not  
4 resolved by the officer or sergeant will be forwarded through the chain of command for  
5 resolution."); Section II(B)(8) ("The officer will forward these grievances to the sergeant who  
6 will initial and forward through the chain of command until the grievance is resolved."); Section  
7 II(C)(1) (supervisor will annotate form "before forwarding up the chain of command."); Section  
8 II(C)(2) (grievance concerning use of force or staff misconduct "will be investigated by the  
9 supervisor and answered or forwarded up the chain of command as determined by the  
10 supervisor."); Section VI(B)(2)(b) (if not resolved by floor sergeant, complaint will be forwarded  
11 to the appropriate platoon lieutenant). Therefore, it appears that Plaintiff exhausted his  
12 administrative remedies insofar as SOP 14.00.00 is concerned.

13 Next, Defendants present evidence that there is an Inmate Handbook that says that an  
14 inmate must proceed all the way through the chain of command to exhaust administrative  
15 remedies. Defendants do not actually produce a copy of that handbook (or the relevant portions  
16 of the handbook), but rely on a representation from Butler that the handbook instructs inmates as  
17 such. (Butler Decl., ECF No. 45-15 at 3 ¶ 9.)

18 Plaintiff, however, states that he does not recall being made aware of or being provided  
19 access to an Inmate Handbook for grievance appeal purposes. (Pl. Decl., ECF No. 46-1 at 2 ¶ 3.)

20 Butler states generally that inmates have access to the handbook, but does not provide  
21 any evidence specifying *how* inmates have access to the handbook, or any evidence that *Plaintiff*  
22 in fact had access to the handbook or was made aware it contained rules regarding the inmate  
23

1 grievance process (*i.e.*, that it was given to him on intake, that it was discussed in an orientation,  
2 or that he was otherwise advised he could request to see the handbook).

3 Butler also represents that the handbook informs inmates that the appeal procedures are  
4 posted in each housing unit (Butler Decl., ECF No. 45-15 at 3 ¶ 9(a)), but Plaintiff states that he  
5 does not recall observing, being made aware of, or having access to any rules for grievance  
6 appeals Defendants claim were posted in the housing units. (Pl. Decl., ECF No. 46-1 at 2 ¶ 4.) In  
7 their reply, Defendants provide no evidence that these rules were actually posted in Plaintiff's  
8 housing unit in a place where Plaintiff would easily have had access to the rules.

9 Butler also states that it is common practice for corrections officers to inform inmates that  
10 if they are not satisfied with the response/decision they receive, they may appeal that decision up  
11 the chain of command. (Butler Decl., ECF No. 45-15 at 3 ¶ 11.) Plaintiff states in his own  
12 declaration, however, that no officer ever informed him he could appeal the decision on his  
13 grievance regarding officer misconduct. (Pl. Decl., ECF No. 46-1 at 2 ¶ 5.) Defendants provide  
14 no evidence that any officer in fact told Plaintiff he could/should appeal his grievance further.

15 In sum, the evidence reflects that Plaintiff complied with the requirements to exhaust  
16 administrative remedies that were made available to him, *i.e.*, those outlined in SOP 14.00.00.  
17 Plaintiff was not required to exhaust unavailable administrative remedies. *Ross v. Blake*, 136  
18 S.Ct. 1850, 1858 (2016). Available means "capable of use for the accomplishment of a purpose"  
19 and that which is "accessible or may be obtained." *Id.* (citation and quotation marks omitted).  
20 The Supreme Court indicated that relevant questions in determining availability of administrative  
21 remedies include whether the procedures were knowable by an ordinary prisoner, or "was the  
22 system so confusing that no such inmate could make use of it." *Id.*

23

1 Plaintiff states he does not recall being notified of the Inmate Handbook. SOP 14.00.00  
2 makes no mention of the Inmate Handbook, and the grievance itself does not advise Plaintiff he  
3 had to take any further steps to exhaust administrative remedies. While Butler represents that  
4 inmates have access to the handbook and the rules were posted in the units, Plaintiff refutes these  
5 contentions, and the defense provides no specific factual details for the court to conclude that  
6 Plaintiff did have access to the handbook containing these additional exhaustion requirements.  
7 On this record, the court cannot conclude that these additional administrative remedies were  
8 available to Plaintiff. *See Albino v. Baca*, 747 F.3d 1162, 1175-76 (9th Cir. 2014) (defendants  
9 failed to carry burden of proving affirmative defense of exhaustion that there was an available  
10 remedy that the inmate failed to exhaust where there was no specific evidence the inmates were  
11 given access or even knew about the manual discussing the grievance procedure or that inmates  
12 otherwise knew about the complaint process, and inmate stated in his declaration he was not  
13 given an orientation, had not seen and was not told about the manual or complaint forms).

14 For these reasons, Defendants' motion for summary judgment based on the argument that  
15 Plaintiff failed to exhaust administrative remedies should be denied.

16 **IV. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that the District Judge enter an order **DENYING**  
18 Defendants' motion for summary judgment (ECF No. 45-15).

19 The parties should be aware of the following:

20 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
21 this Report and Recommendation within fourteen days of being served with a copy of the Report  
22 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
23

1 Report and Recommendation" and should be accompanied by points and authorities for  
2 consideration by the district judge.

3       2. That this Report and Recommendation is not an appealable order and that any notice of  
4 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
5 until entry of judgment by the district court.

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7 | Dated: June 3, 2021

Walter G. Cobb

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William G. Cobb  
United States Magistrate Judge

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